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EXECUTION SALES: LIEN DIVESTITURE AND DISTRIBUTION OF PROCEEDS IN PENNSYLVANIA*

General Principles Relating to Divestiture

The general rules relating to lien divestiture on execution sales and distribution of the proceeds thereof are equitable in origin and accommodated to local conditions by statute. In Pennsylvania, the fundamental, underlying principle governing divestiture is not in accord with the great weight of authority. Though the Pennsylvania Supreme Court recognizes the basic proposition that the only interest which the purchaser at sheriff's sale can acquire is the property right subject to the encumbrance on which execution has been issued, the result achieved in the application of this rule differs from the conclusion reached by the overwhelming majority of jurisdictions with respect to the effect of a sale on a junior encumbrance in divesting senior liens. The view generally prevailing throughout the United States is that a judicial sale on an encumbrance will not divest prior liens. The Supreme Court of Pennsylvania, however, almost from the very beginning, adopted the civil law view that a sheriff's sale divests all liens whether subsequent or prior to the encumbrance on which execution has been issued.[1] Thus in *Girard Life Ins. Co. v. Farmer's Bank*,[2] the general rule is stated as follows:

> ". . . it is to be observed that judicial sales in this state discharge all liens. This is a rule of almost universal application. There are indeed some exceptions to it, created by express statutory enactment, and others growing out of the peculiar character of the lien or encumbrance; but it has long been regarded as sound policy, that property purchased at a judicial sale should pass into the hands of the purchaser clear of all mere liens. Exceptions to the rule are allowed only from necessity. If property be thus sold, the chances are greatly increased that it will bring its full value, thus benefiting the owners and lien-creditors."

If the reason for the Pennsylvania view is the likelihood of selling the property for its actual value if sold clear of all liens, thus benefiting the owners and lien-creditors, even if the rationale be theoretically sound, the experience of recent years would seem to indicate that it has little application in actual practice. However, whatever reasons of public policy may have dictated the rule at its inception, whether they be presently operative or not, the rule itself is definitely a part of the present law of Pennsylvania.

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* [Editor's note: This article, written by the late Maurice H. Brown, Esquire, originally appeared in 17 Temp. L. Q. 217 (1941) and has been brought up to date by Earl H. Lehr, member of the Senior class at Dickinson School of Law. The new material appears in brackets. The Review extends thanks to Temple Law Quarterly for permisison to so use the article.]

1 Presbyt. Corp. v. Wallace, 3 Rawle 109 (Pa. 1831). For good discussion of history of rule in Pennsylvania, see 89 U. of Pa. L. Rev. 373 (1941).

2 57 Pa. 388, 394 (1868).

The broad and fundamental principle enunciated in *Girard Life Ins. Co. v. Farmer's Bank,* supra, may be broken down into a series of narrower and more explicit working rules which seem to underlie the cases on lien divestiture. The term "encumbrance" as employed in the rules which follow includes both liens and estates.

Rule No. 1: The only encumbrances which are paid out of the proceeds of a judicial sale are those which are divested by the sale. Those which are not divested, are not paid.[3]

Rule No. 2: In an execution sale on an encumbrance, the only property interest than can pass to the purchaser is the interest subject to the encumbrance.[4]

Rule No. 3: In an execution sale on an encumbrance, that encumbrance and all subsequent ones are divested.[5]

Rule No. 4: An encumbrance will never be divested on an execution sale unless the property interest passing to the purchaser thereunder is the entire and unimpaired property right which was subject to the encumbrance in question.[6]

Rule No. 5: In an execution sale on an encumbrance, all prior liens are divested unless preserved by reason of the application of Rule No. 4.[7]

Rule No. 6: When a subsequent estate is divested by an execution sale on a prior encumbrance, encumbrances on the estate are likewise divested.

Rule No. 7: For the purpose of divestiture, the record is conclusive, regardless of whether or not the purchaser has knowledge of facts which contradict the record.[8]

Rule No. 8: For the purpose of distribution, the record is not conclusive. The true order of priority will control the rights of parties having knowledge of the facts, and such knowledge may be proved by parol.[9]

Hypothetical illustration of rules: A is the owner of Blackacre. He executes a mortgage thereon to L. Subsequently, he borrows money from M, giving him a judgment note therefor. Though the mortgage hasn't been recorded, M knows of its existence. M places his note on record. Later L records his mortgage. A then conveys Blackacre to B, reserving a ground rent to himself and his heirs. Later N enters judgment against A, and O enters judgment against B. B dies, devising Blackacre to C for life, remainder to D. Then X enters judgment against C, and Y and Z in the order named, enter judgment against D.

1st Case: Z issues execution on his judgment. The purchaser at the sheriff's sale will acquire only the remainder, subject to L's mortgage, M's judgment, and A's ground rent; and the life estate remains undisturbed (Rule No. 2). The judgments of Y and Z are both divested (Rule No. 5). X's judgment is not divested (Rule No. 4) but of course is not

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3 Commonwealth v. Wilson, 34 Pa. 63 (1859).
4 Irwin v. Bank, 1 Pa. 349 (1845).
5 Moore v. Schell, 99 Pa. Sup. 81 (1930).
6 Byrod's Appeal, 31 Pa. 241, (1858); Devine's Appeal, 30 Pa. 348 (1858).
7 Willard v. Norris, 2 Rawle 55 (Pa. 1829).
8 Colonial Trust Co. v. Lincoln Drive Apts., 299 Pa. 117, 149 A. 165 (1930).
9 Britton's Appeal, 45 Pa. 172 (1863).

a lien on the remainder. N's judgment, which is a lien on the ground rent, is not divested (Rule No. 4). Neither M's judgment nor L's mortgage is divested (Rule No. 4). Only the judgments of Y and Z are paid out of the proceeds of the sale (Rule No. 1).

2nd Case: Y issues execution on his judgment. The results are precisely the same as in the first case, the sole difference being that the divestiture of the judgments of Y and Z represents an application of Rule No. 3 rather than of Rule No. 5.

3rd Case: X issues execution on his judgment. The purchaser will acquire only the life estate, subject to L's mortgage, M's judgment, and A's ground rent; and remainder continues undisturbed (Rule No. 2). X's judgment is divested (Rule No. 3). The judgments of Y and Z are not divested (Rule No. 4) but, of course, are not a lien on the life estate. Neither the mortgage of L, nor the judgments of M or N are divested (Rule No. 4). Only X's judgment is paid out of the proceeds of the sale (Rule No. 1).

4th Case: O issues execution on his judgment. The purchaser acquires title to Blackacre, subject to L's mortgage, M's judgment, and A's ground rent (Rule No. 2). C's life estate, D's remainder, and the judgments thereon of Y and Z are all divested (Rule No. 3). N's judgment, which is a lien on A's ground rent, remains (Rule No. 4). Neither L's mortgage nor M's judgment is divested (Rule No. 4). The following liens and estates will be thrown upon the fund produced at the sale—O's judgment, the life estate and remainder, and the judgments of Y and Z. The method of distribution where a life estate and remainder are extinguished by judicial sale will be discussed hereinafter.

5th Case:N issues execution on his judgment. The purchaser acquires only the ground rent (Rule No. 2). The life estate and remainder are not extinguished, for the judgment was not a lien on these interests (Rule No. 2). O's judgment is not divested, for it is a lien on the life estate and remainder, which have not been discharged by the sale (Rule No. 4). The judgments of X, Y, and Z are not divested (Rule No. 4). L's mortgage and M's judgment likewise remain (Rule No. 4). Only N's judgment is paid out of the proceeds of the sale (Rule No. 1).

6th Case: A sues out his ground rent. The ground rent is divested (Rule No. 3). N's judgment, which is a lien on the ground rent, also falls (Rule No. 6). C's life estate and D's remainder are discharged (Rule No. 3). The judgments of X, Y, and Z are divested (Rule No. 6). O's judgment also falls (Rule No. 3). L's mortgage and M's judgment are both divested (Rule No. 7) but L's mortgage is paid out of the proceeds of the sale before M's judgment (Rule No. 8). The purchaser takes the property free and clear of all encumbrances even if he had actual knowledge that L's mortgage antedated M's judgment (Rule No. 7).

7th Case: L forecloses on his mortgage. All encumbrances are divested (Rule No. 7). L is paid out of the proceeds of the sale before M (Rule No. 8).

8th Case: M issues execution on his judgment. The result is precisely the same as in the prior case.

Judgments

A lien may be defined as a charge on property without constituting an interest or estate therein. The most common lien, of course, is that represented by a judgment, which, [. . . in the case of an adverse judgment, is a lien from the time it is rendered, and in the case of an amicable judgment, is a lien from the time the instrument on which it is entered was left for entry. It would seem, however, from the language of the *Judgment Lien Law of* 1947,[9a] which was not repealed by the *Lien Priority Law of* 1951,[9b] that no judgment is a lien unless it is entered of record, and that the duration of the lien extends for a period of five years from the date on which it was entered.] The lien of the judgment may be revived every five years by *scire facias*. The general rule in Pennsylvania, it will be recalled, is that an execution sale divests all liens, whether subsequent or prior to the one on which execution has been issued. For example, in *Silverman v. Keal,*[10] a judgment was entered against the owner of real estate and became a first lien thereon. The property was then sold subject to the lien, and subsequently a creditor of the purchaser entered judgment against him. The second creditor issued execution on his judgment, and it was held that the sheriff's sale divested both judgments, which shared in the proceeds in the order of their entry on record. The court said:

> "The general rule applies and liens of judgment are divested by such a sale even though they are prior and superior to the lien for the enforcement of which the sale is made and though the judgment was obtained against a former owner and the execution is against a subsequent owner. . . ."[11]

There are a few exceptions to the foregoing general rule. Thus when a person dies owning real estate, his heirs or devisees take only the residuum after the decedent's debts have been paid. In consequence, a judgment creditor of the heir or devisee has a lien only on this residuum, and an execution sale on this judgment will not divest the statutory lien under the *Fiduciaries' Act*[12] of the decedent's creditors.[13] It follows that even though the property has been sold at sheriff's sale on a judgment against the heir or devisee, the orphans' court may still direct a sale of the property for the purpose of paying the decedent's debts.[14]

[It has been suggested that the *Fiduciaries' Act of* 1949 "abolished" liens for the ordinary debts of a decedent. It is difficult to find support for such a theory in the statute or in cases. It was a part of the basic law of the province of Pennsylvania that the lands as well as the goods of a decedent were liable for

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9a Act of July 3, 1947, P.L. 1234, § 2, 12 P.S. § 878.
9b Act of June 28, 1951, P.L. 927, § 2, 68 P.S. § 601.
10 135 Pa. Sup. 568, 7 A.2d 57 (1939).
11 Ibid at 570, 7 A.2d 57, 59 (1939). Judgment on a bond accompanying a mortgage is not divested of lien on mortgaged premises if mortgage is not divested. See Cross v. Stahlman, 43 Pa. 129 (1862).
12 Act of June 7, 1917, P.L. 447, 20 P.S. c. 3.
13 Smith v. Seaton, 117 Pa. 382, 11 A. 661 (1887).
14 Horner v. Hasbrouck, 41 Pa. 169 (1861).

the payment of his debts. Early acts of the province recognized this, and it was the "general understanding" that all debts of a person existing at the time of his death, in whatever form and whether evidenced in writing or not, became liens upon his lands at the moment he died. As the law stood through the seventeenth and nearly the whole of the eighteenth century, there was no limitation on the time during which the debts continued to bind the land.[14a] Early statutes with respect to the liens of a decedent's debts did not "create" liens, but simply operated as restraining statutes.[14b] In a number of cases the Supreme Court of Pennsylvania has recognized that a lien for ordinary debts, even as to land aliened bona fide by the heir, existed from the first settlement of the province.[14c]

The repeal of the *Fiduciaries' Act of* 1917 could not, of itself, wipe out a lien which existed for decedents' debts by reason of ancient usage and common law of the state apart from any statute. Nor does the language of the *Fiduciaries' Act of* 1949,[14d] either expressly or by implication "abolish" liens for decedents' debts. On the contrary, the provisions of section 615 of the Act of 1949 seem to imply the existence of a lien or its equivalent "for all claims against the decedent, subject only to the provisions of sections 611 and 612", and to contemplate the enforceability of such claims for a period of one year from the decedent's death even against a "bona fide grantee of, or holder of a lien. . . ."[14e]

As to the means and circumstances under which such liens may be "shaken", several provisions of the *Fiduciaries' Act of* 1949 are applicable. Under sections 616 and 732, a creditor (except a holder of a lien of record) by failing to give the required notice of his claim, where letters have been issued, may lose such claim as to the property to be distributed. Where no letters of administration have been issued within a year of the decedent's death, section 756 provides for the filing of a petition to establish title, with notice to creditors and other parties in interest. If there is no contest, a decree adjudging title shall be confirmed free of all decedent's debts not then liens of record.[14f]]

Another exception to the general rule exists in favor of liens which antedate an interest that is not discharged by the execution sale. This represents nothing more than an application of Rule No. 4, supra. For example, assume that a judgment is a lien on Blackacre. The owner dies, devising a life estate to X, remainder to Y. A judgment is then entered against Y, constituting a lien on his remainder. In an execution on this judgment, the purchaser at sheriff's sale would acquire only the remainder. The life estate would remain undisturbed, for it was not subject to the lien on which execution was issued. It follows that the judgment which

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14a 2 Trickett, Law of Liens in Pennsylvania 516 (1882).
14b Trinity Church v. Watson, 50 Pa. 528 (1865); Campbell v. Fleming, 63 Pa. 242 (1869).
14c Graff v. Smith's Admrs., 1 Dall. 481 (Pa. 1790); Nokes v. Smith, 1 Yeates 238 (Pa. 1793); Horner & Roberts v. Hasbrouck, 41 Pa. 169, 181 (1861); Smith v. Seaton, 117 Pa. 382, 389, 11 A. 661 (1887).
14d Act of April 18, 1949, P.L. 512, 20 P.S. § 320.
14e Act of April 18, 1949, P.L. 512, § 615, 20 P.S. § 320.615.
14f See Act of April 18, 1949, P.L. 512, §§ 616, 732, 756, 20 P.S. §§ 320.616, 732, 756.

precedes the life estate would also remain, for it was a lien on the entire fee, and if the judgment creditor had issued execution, the entire fee would have passed at the sale. It is consequently inequitable to divest his lien and throw it upon a fund produced by a sale of less than the entire fee.[15]

Similar reasoning is applied to prevent the discharge of a judgment lien which is followed by a fraudulent conveyance. For example, in *Byrod's Appeal,*[16] A entered judgment against X, the owner of Blackacre. X then made a conveyance to Y for the purpose of defrauding creditors. Later, B entered judgment against X, and issued execution against Blackacre on this judgment. It was held that A's judgment was not divested by the sheriff's sale. This conclusion is also in conformity with Rule No. 4, supra. When execution was issued by B against X on Blackacre, the legal title to which was in Y, the purchaser at sheriff's sale would have acquired nothing had Y's title been indefeasible. The conveyance to Y having been made in fraud of creditors, however, Y's title was voidable by defrauded creditors, and the purchaser therefore acquired the right to avoid the conveyance in the hands of Y. Whether or not the conveyance was fraudulent is a question of fact, the detemination of which will usually require litigation. A title requiring litigation to enforce clearly isn't as valuable as an undisputed one. It would clearly be inequitable to divest the lien of A's judgment and throw it upon a fund produced at a sale of a litigious right, which would necessarily produce a lesser sum than would be realized in an execution sale on his own lien. Hence, in accordance with Rule No. 4, supra, since the interest passing at the sheriff's sale was not the entire and unimpaired property right which was subject to the lien of A's judgment, his lien will not be divested.[17]

There is another interesting application of Rule No. 4 in *Patterson's Estate,*[18] the facts of which were as follows: A entered judgment against X, the owner of Blackacre. X then entered into an agreement of sale of Blackacre to Y. After the agreement of sale was entered into, but before a deed to the premises was executed and delivered to the purchaser, B entered judgment against X, and issued execution thereon. It was held that the sale did not divest the lien of A's judgment, which therefore was not permitted to share in the proceeds of the sale. Said the Supreme Court of Pennsylvania:

> "After a man has contracted to sell his land, he holds a very different title to it from which he held before; for, after that, he holds the legal title in trust to convey it to the purchaser on his performance of the contract. Judgments obtained after such a contract are therefore liens upon a different estate in the land, from those obtained before it; and a sale on them cannot have the same effect as a sale on the prior judgments. . . . A sale on them affects only the estate left in the debtor after his contract of sale, which may be very small, depending upon the amount of

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15 See Hacker v. Cozzens, 92 Pa. 461 (1880).
16 31 Pa. 241 (1858).
17 See also Zuver v. Clark, 104 Pa. 222 (1883); Moseby v. Fleck, 233 Pa. 102, 81 A. 930 (1911).
18 25 Pa. 71 (1855).

> the purchase-money remaining unpaid—it conveys a right to receive this so far as the judgment debtor himself could demand it. . . . It is very plain, therefore, that a sale on the judgments subsequent to the contract of sale, cannot discharge the lien of those that were prior, and these are not entitled to share in the distribution of the proceeds."[19]

It is extremely doubtful whether the foregoing case is law at the present time in the light of the Act of June 12, 1931,[20] which makes an unrecorded deed or agreement of sale of realty fraudulent and void as to subsequent judgment creditors. . . .it would seem that a judgment entered against the vendor after the latter has entered into an agreement of sale, which was unrecorded, is a lien on both the legal and equitable estate. [The Act of 1931 was so construed in *Crowell et al v. Bell, Receiver*[20a] which was decided in 1940; the facts were as follows: A owned a vacant lot and entered into an unrecorded agreement of sale thereof with B on January 10, 1938. Posters marked "sold" were placed upon the premises, and the court held this constituted constructive notice of the agreement of sale. On January 19, 1938, C entered judgment against A and later he issued a writ of fi fa upon his judgment. It was held that judgment creditors obtain liens upon all the properties standing in the name of the judgment debtor at the time of the entry of their judgments. But, B was held to have taken the land free of C's lien since the latter had constructive notice of the agreement of sale between A and B. The court said:

> "Prior to the Act of 1931, it would seem that a person entering a judgment obtained only a lien upon the property of the judgment debtor which he actually owned, irrespective of whether or not the instrument by which he had conveyed title away from himself was or was not recorded. After the Act of 1931, it would seem that a person entering his judgment, obtains a lien upon the property standing in the name of the judgment debtor on the record, unless such judgment creditor has either actual or constructive notice of the outstanding title."]

Hence in an execution sale upon such a lien, prior judgments against the vendor entered when he owned both the legal and equitable title ought to be divested, for both the prior and the subsequent judgments would appear to be liens on precisely the same property interests.

Mechanics' Liens

A mechanic's lien is treated much the same as a judgment lien for purposes of divestiture.[21] For example, if the order of encumbrances were mechanic's lien, judgment, judgment, an execution sale on any of the three would divest all of them, and they would share in the proceeds in the order of their priority on record. It should be kept in mind in this connection that a mechanic's claim, in the case of new construction, must be filed within six months after the completion of the

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19 25 Pa. 71, 73 (1855). See also Siter, James & Co's Appeal, 26 Pa. 178 (1856).
20 P.L. 558, § 1, 21 P.S. § 351.
20a 40 D. & C. 326 (1940).
21 See Act of June 4, 1901, P.L. 431, § 45, 49 P.S. §§ 182, 183.

work or the furnishing of the last material, and when so filed, it constitutes a lien as of the visible commencement of the work.[22] Thus if there is a mortgage on record prior to the date of the filing of a mechanic's claim, but the latter, as filed of record indicates that the construction work had commenced prior to the date of the mortgage, in an execution sale on the mechanic's lien, the mortgage will be divested, and the purchaser will take a clear title.[23] If, however, the claim does not show on its face when the construction of the building began, and the claim was filed after the recording of the mortgage, a purchaser at sheriff's sale would take the property subject to the mortgage. Moreover, it could not be shown by parol, for the purpose of divesting the mortgage, that the commencement of the construction work antedated the mortgage, and that the purchaser at sheriff's sale had actual knowledge of this fact.[24] For the purposes of divestiture, the record title is conclusive (Rule No. 7, supra). When, however, the question in issue is not what liens are divested, but rather the priority of the various distributees of the fund produced at sheriff's sale, the true facts may be shown by parol for the purpose of determining the priority of the claimants *inter se*.[25] For example, suppose the record order of encumbrances is first mortgage, and then mechanic's lien. The mechanic's claim on record does not disclose on its face when the construction work began, but the fact is that its visible commencement antedated the mortgage. In a foreclosure on the mortgage, the mechanic's claim would be paid out of the fund produced at sheriff's sale before the mortgagee received anything.[26] For purposes of distribution, the true facts may be shown by parol (Rule No. 8).

Mechanic's liens for alterations and repairs present no greater problems in divestiture than do ordinary judgment liens, for the lien of a mechanic's claim for alterations and repairs is as of the date of the filing of the claim.[27]

Taxes And Other Public Claims

As a matter of common law right, the Commonwealth's lien for taxes continues on the property until the tax claim is paid in full. If the proceeds of a sheriff's sale are insufficient to pay the Commonwealth's claim in full, the lien continues for the unpaid balance.[28] This rule has been incorporated into the Act of June 3rd, 1933,[29] which provides in substance as follows:

> 1. State taxes shall constitute a first lien on property, subject however, to liens against predecessors in title.

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22 Citizens Bank v. Lesko, 277 Pa. 174, 120 A. 808 (1923). Where the work is merely for alterations or repairs, the period for filing expires three months after completion of the work, and the lien takes effect as of the date of its filing. Act of June 4, 1901, P.L. 431, § 13, 49 P.S. § 203.

23 Reynolds v. Miller, 177 Pa. 168, 35 A. 702 (1896).

24 Reading v. Hopson, 90 Pa. 494 (1879); Hilliard v. Tustin, 172 Pa. 354, 33 A. 574 (1896).

25 Knoell v. Carey, 285 Pa. 498, 132 A. 702 (1926).

26 See Trustees of High School v. McCann, 246 Pa. 28, 91 A. 1051 (1914). Citizens Bank v. Lesko, 277 Pa. 174, 120 A. 808 (1923).

27 Rausch v. Island Park Assoc., 226 Pa. 178, 75 A. 202 (1910).

28 Commonwealth v. Lowe Coal Co., 296 Pa. 359, 145 A. 916 (1929).

29 P.L. 1474, 72 P.S. § 1401.

2. If the sum realized at sheriff's sale is insufficient to pay the State taxes in full, the lien thereof continues as to the unpaid balance, unless a lien against a predecessor in title has been divested by the sale.

[In certain instances, the legislature has provided that a particular state tax shall be inferior to certain previously recorded liens.[29a]]

Unlike taxes owing to the State, local taxes are discharged even though the proceeds of the judicial sale are insufficient to pay the tax claim in full. This is the common law rule.[30] At the present time, however, the divestiture of liens for taxes and municipal claims is governed by the Act of May 16th, 1923,[31] which provides in part as follows:

> "The lien of a tax or a municipal claim shall not be divested by any sale of the judicial sale of the property liened, where the amount due is indefinite or undetermined, or where the same is not due and payable; nor shall the lien of a tax or municipal claim be divested by any judicial sale of the property liened, as respects so much thereof as the proceeds of such sale may be insufficient to discharge. . . ."

It has been held that the provision in the Act of 1923 providing that the lien for local taxes and municipal claims shall not be divested "by any judicial sale of the property liened, as respects so much thereof as the proceeds of such sale may be insufficient to discharge" has no application to a sale on the tax or municipal lien itself. In such case, the lien is discharged even though the proceeds of the sale may be insufficient to pay it in full.[32] It is to be noted that the Act provides for a complete divestiture of tax and municipal liens if the proceeds of the judicial sale are sufficient to pay them. The Act does not say that actual payment is necessary for divestiture. Thus in a case where the proceeds of a sheriff's sale were sufficient to pay taxes in full, after payment of costs, but the taxes were not in fact paid due to the neglect of the county treasurer in failing to give notice of the delinquency to the sheriff, it was held that the lien of the taxes was nonetheless divested.[33] Where the proceeds, after payment of costs, are sufficient to pay the taxes only in part, the tax lien will be discharged *pro tanto,* even though no part of the taxes was actually paid because of the failure of the taxing authorities to give notice of their existence to the sheriff.[34] [The provisions of the *Real Estate Tax Sale Act* of July 7, 1947[34a] are to the same effect. The act states that "the lien of all taxes and municipal claims . . . levied or assessed against any property shall be divested by any public sale of such property under the provisions of this act, if the amount of the purchase money shall be at least equal to the amount of the prior tax liens of the Commonwealth, the amount of all taxes and municipal claims due on such property, and costs of sale."

29a Act of December 5, 1936, P.L. (1937) 2897, 43 P.S. § 788.1. See Blue Ball National Bank v. Diller, 53 D. & C. 445 (1945).
30 Hopkins v. Rettinger, 230 Pa. 192, 79 A. 255 (1911).
31 P.L. 207, § 31, 53 P.S. § 2051.
32 Dry Rock Ass'n. v. Georeno, 106 Pa. Sup. 505, 163 A. 382 (1932).
33 Harrisburg Trust Co. v. Romberger, 135 Pa. Sup. 394, 5 A.2d 597 (1939).
34 Lackawanna County v. Jessick, 40 D. & C. 389 (1940).
34a P.L. 1368, § 304 as amended June 30, 1951, P.L. 991, 72 P.S. § 5860.304.

The Act further provides for an affirmative duty on the part of the county tax claim bureau or any other officer having claims or judgments for taxes and municipal claims for collection, to give notice to the officer or person selling the property of the amount of tax liens of the Commonwealth, and of the amount of all taxes and municipal claims against the same.]

Taxes and other periodic municipal charges, such as water rents, are liens on the property from the date they fall due. Other municipal charges which are not periodically recurrent, such as for municipal improvements, for example, are liens as of the date of their assessment.[35] To retain their lien, however, taxes and other periodic charges must be recorded within three years after they become payable; other municipal claims, generally speaking, must be filed within six months after the completion of the work.[36] If the tax or other claims have not been filed within the stipulated period, they lose their liens, and will not share in the proceeds of a judicial sale held thereafter.[37]

Local taxes and municipal claims are made first liens by statute, and are therefore paid out of the proceeds of a judicial sale before other encumbrances which may have been recorded before the tax claim accrued.[38] It has been held, however, that the legislature did not intend to afford local taxes priority over state taxes, and consequently, the latter are prior in payment.[39] [It is so provided in the Act of July 7, 1947.[39a]]

Though taxes and municipal claims are liens before they are actually recorded, for the purpose of determining divestiture, the record is controlling, and if unrecorded, will be treated as non-existent. For example, if there is a recorded tax or municipal lien prior to the recording of a mortgage, in an execution sale on a junior encumbrance, the mortgage will be divested.[40] If, however, the tax or municipal claim, though due, has not been recorded, and a subsequently created mortgage is the first encumbrance on the record, an execution sale on a junior encumbrance will not divest the mortgage even though the taxes are prior in lien.[41]

There is a statutory procedure to divest encumbrances prior to the tax or municipal lien when the amount bid at sheriff's sale is insufficient to pay them in full. The holder of the claim may postpone the sale, and petition the court for a rule to show cause on all parties in interest why the property should not be sold free and clear of all mortgages, liens, estates and other encumbrances.[42] There is also a statutory procedure for divesting tax and municipal liens where

35 Merion Township v. Manning, 95 Pa. Sup. 322 (1928).
36 Act of May 16, 1923, P.L. 207, § 9, 53 P.S. § 2029.
37 Pittsburg v. Brosman, 79 Pitt. Leg. J. 258 (1931).
38 Act of May 16, 1923, P.L. 207, § 2, 53 P.S. § 2022.
39 Westmoreland County v. Westmoreland Brewing Co., 8 D. & C. 378 (1925); Commonwealth v. Philadelphia Pure Rye Whiskey Distilling Co., 38 D. & C. 245 (1940).
39a Note 34a, supra.
40 Fisher v. Conrad, 100 Pa. 63 (1882).
41 Act of April 30, 1929, P.L. 874, § 1, 21 P.S. § 651.
42 Act of May 16, 1923, P.L. 207, § 31, 53 P.S. § 2051. Erie v. Piece of Land, 339 Pa. 321, 14 A.2d 428 (1940) (Act is constitutional as to mortgage created before its enactment).

the value of the property in excess of encumbrances not discharged at a sheriff's sale on a tax claim, is less than the total amount of all delinquent taxes and municipal claims assessed against the property.[43]

There is a right of redemption where property has been sold on a tax or municipal claim. Within a year after the sale, the owner or any party whose lien or estate has been discharged may redeem the property by paying ". . . the amount bid at such [sheriff's] sale; the cost of drawing, acknowledging, and recording the sheiff's deed; the amount of all taxes and municipal claims, whether or not entered as liens, if actually paid; the principal and interest of estates and encumbrances, not discharged by the sale and actually paid; the insurance on the property, and other charges and necessary expenses of the property, actually paid, less rents or other income therefrom, and a sum equal to interest at the rate of ten per-centum per annum thereon, from the time of each of such payments."[44] The primary right to redeem is in the owner, and it is then conferred upon encumbrancers, priority being according to seniority. [However, under the Act of May 22, 1945,[44a] whenever a claimant in any county of the first class has obtained a judgment upon its tax or municipal claim, it may file a petition in the court in which the proceeding is pending for a rule upon all parties shown to be interested, to appear and show cause why a decree should not be made that said property be sold "freed and cleared of their respective claims, mortgages, ground rents, charges and estates, and without any right of redemption after such sale." Thus, insofar as it is inconsistent with this section, section 32 of the Act of May 16, 1923,[44b] providing for a right of redemption is repealed.]

Charges On Land Created By Will Or Deed

Section 17 of the Wills Act[45] [(1917) . . . provided that pecuniary legacies should constitute a charge on real estate not specifically devised where the personal estate is insufficient for their payment. Section 14, subsection 13 of the *Wills Act of* 1947[45a] which replaces section 17 of the 1917 Act is consistent with the prior law. There is a change, however, with respect to legacies of one hundred dollars or less in that they shall not constitute a charge on any of the testator's real estate. The prior law made no distinction as to amount. Thus, a legacy of $100 would not be a charge on real estate, but a legacy of $100.01 would be[45b]] Though there is no statute of limitations with respect to the lien of the legacy, there is a statutory presumption of payment after twenty-one years.[46] [Section 804 of the *Fiduciaries' Act of* 1949[46a] provides as follows:

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43 Act of June 26, 1939, P.L. 1100, §§ 1, 2, 3, 72 P.S. §§ 5941.1, 5941.2, 5941.3.
44 Act of May 16, 1923, P.L. 207, 53 P.S. § 2052.
44a Act of May 16, 1923, P.L. 207, § 31.1, added May 22, 1945, P.L. 814, § 1, 53 P.S. § 2051.1.
45 Act of June 7, 1917, P.L. 403, § 17, 20 P.S. § 241.
45a Act of April 24, 1947, P.L. 89, § 14, 20 P.S. § 180.14.
45b See Commission's comment to clause 13 of § 14 of the 1947 Act.
46 Act of April 27, 1855, P.L. 368, § 7, 12 P.S. § 80; Wingett's Appeal, 122 Pa. 486, 15 A. 863 (1888); Stephenson's Estate, 256 Pa. 487, 100 A. 985 (1917).
46a Act of April 18, 1949, P.L. 512, §804, 20 P.S. § 320.804.

". . .When (1) for twenty years after the same or any part thereof becomes due, no payment has been made on account of a dower, recognizance, legacy, annuity instalment, or other charge, created by will, inter vivos trust or court decree, upon real property; or (2) no proceeding has been brought or no written acknowledgment of the existence thereof or no written promise to pay the same has been made within such period by the owner or owners of the property subject to the charge, a release or extinguishment thereof shall be presumed, and the charge shall thereafter be irrecoverable."

Provision is made for the perpetuation of evidence and the renewal thereof every twenty years. If the evidence does not appear of record or is not indexed as provided for, within twenty years, then the charge "shall be irrecoverable from any purchaser, mortgagee, or other lien creditor."] It is interesting to note that. . . [under the 1855 Act, the presumption has been held to arise] even against persons under a disability, for the Act makes no exception in favor of such persons.[47]

Where the legacy constituting a charge on the real estate, or other charge expressly created by will or deed, is either certain in amount or its cash value definitely determinable at the time of the judicial sale, it is treated the same as a judgment lien, and is divested in an execution sale on a junior encumbrance.[48] Nor is it material that the legacy, though pecuniary, is to be satisfied in part by personal property other than money.[49] The fact that the legacy or other charge is not yet due on the date of the sale will not prevent its divestiture, as long as the due date is certain. For example, it has been held that the lien of a legacy payable in installments on specified future dates will be discharged even though some of the installments may not be due at the time of sale.[50] In such a case, the future installments are reduced to their present cash value.[51] [The *Fiduciaries' Act of* 1949, section 802[51a] provides that, where it is not contrary to an express provision in the will or trust instrument, if a charge is not presently payable, the court may discharge such portion of the property as is not needed to provide for sufficient security for payment, upon petition of a party in interest and after such notice as the court shall direct.] Where, however, the future installments are not payable on a definite date, the present cash value of the charge is indeterminate, and it will not be divested by an execution sale on a junior encumbrance. For example, in *Cowden's Estate,*[52] legacies charged on certain real estate were made payable to testator's grandchildren when they either attained full age or married. In a judicial sale on a subsequent encumbrance before any of the grandchildren had attained their majority or married, it was held that the lien of their legacies

47 Wallace v. Church, 152 Pa. 258, 25 A. 520 (1892).
48 Nichols v. Postlethwaite, 2 Dallas 131, (Pa. 1791); Wood's Appeal, 20 W. N.C. 250 (1887); Hanna's Appeal, 31 Pa. 53 (1857); Pryer v. Mark, 129 Pa. 529, 19 A. 895 (1889); Pierce v. Gardner, 83 Pa. 211 (1876).
49 Gallagher's Appeal, 48 Pa. 121 (1864).
50 Lobach's Case, 6 Watts 167 (Pa. 1837).
51 Hellman v. Hellman, 4 Rawle 440 (Pa. 1834).
51a Act of April 18, 1949, P.L. 512, § 802, 21 P.S. § 320.802.
52 1 Pa. 267 (1845).

was not divested because their cash value was incapable of being ascertained. Likewise in *Dewart's Appeal,*[53] a legacy was bequeathed to a named legatee, payable to him between the ages of twenty-one and twenty-five at the discretion of the trustee. The legacy was charged upon certain lands devised to the trustee. In an execution sale on a judgment entered against the latter, the lien of the legacies was held not to be divested. Said the court:

> "The purchasers had constructive notice of the charge, and they were bound to know that it was a lien of such indeterminate value that it would not be divested by the sheriff's sale."[54]

In like manner, a charge of a certain sum payable after the death of a life tenant is regarded as being of indeterminate value, and hence will not be divested by a sheriff's sale on a junior encumbrance in the life time of the life tenant.[55] When, however, the execution sale takes place after the death of the life tenant, the charge being due and payable and certain in amount, it will be divested in a sale on a junior encumbrance in accordance with the general rule already discussed.[56] On principle, a contingent legacy ought not to be divested in a sale on a junior encumbrance where the contingency vesting the legacy had not yet occurred at the time of the execution sale, for in such case the value of the gift must necessarily be indeterminate.[57] Though, as has been seen, the law will reduce to present cash value a legacy payable in a specified number of future installments, apparently a like rule does not prevail with respect to periodic payments for life. It would seem that resort is not had to mortality tables for the purpose of commuting a life annuity. Though the law cannot be said to be certain, it seems that the present cash value of an annuity for life is regarded as being indeterminate, and hence is not discharged in a sheriff's sale on a junior encumbrance.[58] However, arrears on a life annuity, due and unpaid at the time of the execution sale are divested and paid out of the proceeds of such sale, for the arrears are a sum certain, and the lien for such arrears is therefore of a determinate value.[59]

To the general rule that all liens are divested by a judicial sale, the Supreme Court of Pennsylvania, on numerous occasions, has stated one of the exceptions to be ". . .liens created by last wills and testaments as permanent provisions for wives and children."[60] Why such provisions should be treated as a separate and independent exception to the general rule is somewhat difficult to perceive, for it would seem that they fall within the scope of one of the other well recognized

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53 43 Pa. 325 (1862).
54 Ibid at 326.
55 Heist v. Baker, 49 Pa. 9 (1865).
56 Strauss's Appeal, 49 Pa. 353 (1865).
57 See Schnure's Appeal, 70 Pa. 400 (1872).
58 Knaub v. Esseck, 2 Watts 282 (Pa. 1834); Dewalt's Appeal, 20 Pa. 236 (1853): "True, the law does seek to discharge liens as far as possible by judicial sales; but it cannot do so in all cases. . . ."
59 Reed v. Reed, 1 W. & S. 235 (Pa. 1841); see also Ohio-Pennsylvania Joint Stock Land Bank v. Blough, 119 Pa. Sup. 34, 180 A. 45 (1935).
60 Pennsylvania Trust Co. v. Deininger, 315 Pa. 278, 281, 172 A. 691, 696 (1934). See also Washburn's Estate, 187 Pa. 162, 40 A. 979 (1898); Rohn v. Odenwelder, 162 Pa. 346, 29 A. 899 (1894); Levengood's Estate, 38 Pa. Sup. 491 (1909).

exceptions,—a charge that does not readily admit of valuation. The Supreme Court of Pennsylvania has recognized this fact on at least one occasion. Thus in *Walters v. Steele,*[61] the court said:

> "The only reason why the future arrears of annuity, payable out of the land to the widow, have been excepted, is on account of the impossibility of computing their amount."

Moreover, the same rule has been applied when the provisions were made by deed;[62] so that the provisions need not be testamentary to fall within the exception. In addition, it is not at all unlikely that a charge for permanent support is to be considered a fixed lien and not divested by executions on junior encumbrances even in cases where the beneficiaries are other than wives or children.[63]

If, as seems the case, the charge of a life annuity is regarded as being incapable of determinate valuation, and is to be treated as a fixed lien, clearly such is the fact in the case of a charge for life support not specified in monetary terms, as for example, "maintenance during their natural lives,"[64] or "a living in the old homestead so long as she remains unmarried."[65]

Another independent exception to the general rule that all liens are divested on a judicial sale, is a charge which is intended to run with the land.[66] For example, in *Pennsylvania Trust Co. v. Deininger,*[67] a legacy was expressly made a charge on certain land, and it was to "remain in lien on the plantation until the whole is paid." The Supreme Court of Pennsylvania said that testator "disclosed quite plainly that the charge should stand in the title," and therefore was not divested in a sheriff's sale on a posterior lien.

If a monetary charge may stand in the title as a fixed lien, *a fortiori,* the same rule will apply with respect to covenants running with the land which do not call for the payment of money. The clearest illustration of this type of covenant is represented by an easement, and it has been properly held that a judicial sale on an encumbrance postdating an easement will not discharge it.[69] Where a fixed lien remains in the title after a sheriff's sale, it will support anterior liens which will likewise fail of divestiture.[70] This, of course, is merely an application of Rule No. 4, supra.

Mortgages

Pennsylvania common law treated the mortgage as an ordinary lien for the purposes of divestiture.[71] The first statutory change occurred in 1830. The original

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61 210 Pa. 219, 221, 59 A. 821 (1904).
62 Bank v. Kline, 155 Pa. 613, 26 A. 692 (1893).
63 See Dewalt's Appeal, 20 Pa. 236 (1853); Rohn v. Odenwelder, 162 Pa. 346, 29 A. 899 (1894).
64 Bonebrake v. Summers, 193 Pa. 22, 44 A. 330 (1899).
65 Walter's Estate, 197 Pa. 555, 47 A. 862 (1901).
66 Hartzell's Estate, 188 Pa. 383, 41 A. 879 (1898).
67 315 Pa. 278, 172 A. 695 (1934).
68 Ibid at 282, 172 A. 695, 697 (1934).
69 Overdeer v. Updegraff, 69 Pa. 110 (1871).
70 Wertz's Appeal, 65 Pa. 306 (1870).
71 Williard v. Norris, 2 Rawle 56 (Pa. 1829).

Act has been amended several times since that date, the present Act being that of April 30th, 1929,[72] which provides in part as follows:

> "When the lien of a mortgage upon real estate is or shall be prior to all other liens upon the same property, except other mortgages, ground rents, and purchase money due the Commonwealth, and except taxes, municipal claims and assessments, not at the date of said mortgage duly entered as a lien in the office of the prothonotary . . . the lien of such mortgage shall not be destroyed . . . by any judicial sale. . . ."[73]

A mortgage is a lien as of the minute it is left at the recorder's office for recording. There is an exception, however, in favor of purchase-money mortgages, which constitute a lien from the date of the mortgage provided recording takes place within thirty days thereafter.[74] [This priority given purchase-money mortgages is restated in the *Lien Priority Law of* 1951.[74a] There is no distinction between "recorded" and "left for record" under the Act of 1927, as the terms are used interchangeably. The section of the Act of 1951 uses only the term "left for record". Hence, the lien of a mortgage dates from the time of its being left for record, without regard to any delay in recording or indexing it.[74b]] Thus mortgages left with the recorder at the same time have equality of lien even though, of necessity, one must appear in the mortgage book ahead of the other.[75] Though an early Pennsylvania statute[76] provides that no mortgage shall be effective to pass an estate in lands unless recorded within six months after the date thereof, it is now definitely established that a mortgage is a lien as of the . . .[time it is left for record] even though . . . [this occurs] more than six months after the date. . . [of the mortgage.]

The purpose of recording is to provide constructive notice of the existence of the mortgage. Hence, even without recording, it is valid and effective as against the mortgagor, those standing in his shoes, and all persons having actual knowledge of its existence. Thus it has been held that the heirs of the mortgagor cannot enjoin the foreclosure of an unrecorded mortgage.[78] In *Britton's Appeal,*[79] a mortgage was executed and delivered, but not recorded until after several judgments had been entered against the mortgagor. However, the judgment creditors had knowledge of the existence of the mortgage at the time the debts were contracted. Execution was issued on the judgments, and the property sold at sheriff's sale. Though the judgments were prior on the record, it was held that the mortgage

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72 P.L. 874, § 1, 21 P.S. § 651.
73 Act does not apply to "mortgages on unseated lands or sales of the same for taxes."
74 Act of April 27, 1927, P.L. 440, § 1, 21 P.S. § 622. See Act of 1951, footnote 74a, infra.
74a Act of June 28, 1951, P.L. 927, § 3, 68 P.S. § 601.
74b Wood's Appeal, 82 Pa. 116 (1816).
75 Bonstein v. Schweyer, 212 Pa. 19, 61 A. 447 (1905).
76 Act of May 28, 1715, 1 Sm. L. 94, § 8, 21 P.S. § 621.
77 Fries v. Null, 154 Pa. 573, 26 A. 554 (1893).
78 McLaughlin v. Ihmsen, 85 Pa. 364 (1877). Holder of unrecorded mortgage cannot, by giving notice thereof at sheriff's sale, prevent its divestiture where judgment creditor who issued execution had no notice of mortgage when he entered his judgment. Uhler v. Hutchinson, 23 Pa. 110 (1854).
79 45 Pa. 172 (1863).

was entitled to be first paid out of the proceeds of the sheriff's sale. The conclusion is in conformity with Rule No. 8, supra.

[. . . Judgments entered of record continue as liens for a period of five years from the date on which they are entered, unless, of course, they are sooner discharged by law. The time of priority of judgment liens over that of other liens is determined from the time the judgment is rendered, in the case of an adverse judgment, and, in the case of an amicable judgment, from the time the instrument on which it is entered was left for entry.[79a] Mortgages, in general, are liens as of the time they are left for record. An exception exists in favor of purchase-money mortgages.] Where a purchase-money obligation has been given, for most purposes, the interest of the vendee of the property is regarded as being merely his equity therein, and a judgment against him will constitute a lien on that equity alone. For example, in *Cake's Appeal,*[81] A had sold Blackacre to B. After the agreement of sale had been entered into, but before the delivery of the deed to B, X entered judgment against him. When A delivered the deed to B, he took back a purchase-money mortgage which was duly recorded within the statutory period. X issued execution against Blackacre under his judgment. It was held that the lien of the mortgage was not divested. Said the court:[82]

> "A mortgage given for the residue of the purchase-money due upon a tract of land bearing even date with the conveyance of the legal title, and duly recorded, has priority of lien over judgments obtained against the holder of the equitable interest anterior to the conveyance. . . ."[83]

. . . It has also been held that where several purchase-money mortgages have been executed, they are all co-equal in lien, and a foreclosure of one discharges all,[85] unless one is expressly made subject to the other, in which case a foreclosure of the former will not discharge the latter.[86]

Interest due on a mortgage accrues to the mortgage debt and becomes a part thereof.[87] Hence, when judgment is entered for interest due on a bond accompanying a mortgage, its lien is as of the date of the mortgage, and an execution sale on such judgment consequently discharges the mortgage itself.[88] The applicable principle is stated in *Commonwealth v. Wilson,*[89] as follows:

79a See discussion under Judgments, supra.
80 Deleted.
81 23 Pa. 186 (1854).
82 Ibid at 188.
83 See also Siner's Appeal, 36 Pa. 247 (1860), wherein a purchase-money mortgage was held to be prior in lien to mechanic's lien, even though the construction work had visibly commenced before the vendee acquired legal title and gave back a purchase-money mortgage. See also Vierheller's Appeal, 24 Pa. 105 (1854).
84 Deleted.
85 Dungan v. American Life Ins. Co., 52 Pa. 253 (1866).
86 Pease v. Hoag, 11 Phila. 549 (1875). There would seem to be some question as to whether this holding is affected by the Lien Priority Law of 1951, infra, or, whether the time of priority for purchase-money mortgages therein provided is applicable only between liens of purchase-money mortgages on the one hand, and other types of liens on the other hand.
87 West Branch Bank v. Chester, 11 Pa. 282 (1849).
88 Hartz v. Woods, 8 Pa. 471 (1848).
89 34 Pa. 63, 67 (1859).

> "If a sale is made on a judgment for the whole or a part of a debt, or even for the interest of part of a debt secured by a mortgage, it has the same effect as if the sale had been directly made under proceedings upon the mortgage security itself. . . ."

Ground Rents

A ground rent is real property. It is taxable as realty,[90] descends to the heirs at law on the death of the owner,[91] and judgments against the owner are liens upon the rent.[92] For the purposes of divestiture, the ground rent is treated as an estate in the land, and hence is not divested in a sale under a posterior lien on the corporeal fee. For example, in *Irwin v. Bank*,[93] A who was owner of Blackacre, conveyed the same to B in fee, reserving a ground rent to himself and his heirs. Later, A paid the taxes assessed against the ground rent, but B failed to pay the taxes assessed against corporeal Blackacre. The delinquent taxes were entered of record as a lien, and Blackacre sold at tax sale. In holding that the purchaser took the property subject to the ground rent, the Supreme Court of Pennsylvania said:

> "The rent in this case, though it issued out of ground or land, is considered as an estate altogether distinct, and of a very different nature from that which the owner of the land has in the land itself. Each is considered the owner of a fee-simple estate. The one has an estate of inheritance in the rent, and the other has an estate of inheritance in the land out of which the rent issues. The one is an incorporeal inheritance in fee, and the other a corporeal inheritance in fee. . . ."[94]

Since the ground rent is treated as an estate which is not extinguished by a sale under a subsequent encumbrance on the corporeal fee, liens which antecede the ground rent are likewise preserved in accordance with Rule No. 4, supra. A good illustration of this principle is provided in *Hacker v. Cozzens*.[95] Blackacre was subject to two successive ground rents and a mortgage. The mortgage, which was the inferior encumbrance, was foreclosed, and the question was whether arrears on the first ground rent were discharged. When the ground rent deed contains a clause of re-entry, arrears constitute a lien as of the date of the ground rent itself regardless of when they accrued.[96] It was held that the lien of the arrears was not divested, the court making the following observations:

> "It is very clear that if the mortgage upon which the property in dispute was sold, had been the next lien in point of time to the first ground-rent, the arrears of such ground-rent would have been discharged. But there was a second ground-rent intervening between it and the mortgage. This was not only a fixed lien, which could not be disturbed except as to the arrears thereof, but it was also an estate, and of greater dignity

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90 Robinson v. Allegheny Co., 7 Pa. 161 (1847).
91 Cobb v. Biddle, 14 Pa. 444 (1850).
92 Bank v. Peace, 27 Pa. Sup. 643 (1905).
93 1 Pa. 349 (1845).
94 1 Pa. 349, 353 (1845).
95 92 Pa. 461 (1880).
96 Bantleon v. Smith, 2 Binn. 146 (Pa. 1849); Pancoast's Appeal, 8 W. & S. 381 (Pa. 1845). Where there is no clause of re-entry, it would seem that arrears are not a lien on the fee. See Sands v. Smith, 3 W. & S. 9 (Pa. 1841).

than a mere lien or a mortgage. As a necessary result, the arrears of the prior ground-rent were not payable out of the proceeds. A judicial sale extinguishes liens, not estates. . . ."[97]

If, in the foregoing case, the order of encumbrances had been ground rent, mortgage, judgment, and an execution sale were had on the judgment, the result would have been the same. The arrears of ground rent would not have been divested.[98] On the other hand, if the order of encumbrances had been ground rent, mortgage, in a sale on the mortgage, the arrears of ground rent would have been divested and paid out of the proceeds of the sheriff's sale, for there is no undivested fixed lien or estate posterior to the lien for arrears, and hence Rule No. 4, supra, cannot be invoked to save such arrears from divestiture.[99]

Since the arrears, regardless of when they accrued, constitute a lien as of the date of the creation of the ground rent, they will be paid out of the fund produced at sheriff's sale before judgments which were entered after the date of the ground rent, but before the entry of judgment for the arrears.[100] An interesting question arises in this connection. When a mortgage is preceded only by a ground rent, and a judgment for rent in arrears is entered after the recording of the mortgage, in an execution sale on the judgment, will the mortgage be divested? In 28 C. J. 863, it is stated:

"On the theory that a ground rent lien for arrears relates back to the date of the ground rent deed, the lien cuts out all intervening encumbrances."

In Cadawalder, *Law of Ground Rents,* Section 259, the same rule is repeated in almost identical language:

"The lien of the arrears, dating back to the original reservation, cuts out all intervening incumbrances."

If by "cuts out" is meant "divests," actual case authority for the proposition is very meager and unsatisfactory,[101] and the writer seriously questions the correctness of this view.[102] Its adoption would seem to defeat the purposes intended to be accomplished by the Act of 1929 relating to the preservation of the liens of mortgages.[103]

Unlike mortgage interest which, as has been seen, is treated as a part of the mortgage debt, arrears of ground rent do not become a part of the rent by accretion. A ground rent is an estate in the land. The arrearages are a mere lien. They cannot be added to the estate so as to become a part of it, and an execution sale on a judgment for arrearages will not divest the ground rent.[104]

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97 Hacker v. Cozzens, 92 Pa. 461, 465 (1880).
98 Devine's Appeal, 30 Pa. 348 (1858).
99 See Hacker v. Cozzens, 92 Pa. 461 (1880); Dickinson v. Beyer, 87 Pa. 274 (1878); Ohio-Pennsylvania Joint-Stock Land Bank v. Blough, 119 Pa. Sup. 34, 180 A. 45 (1935).
100 Bantleon v. Smith, 2 Binn. 146 (Pa. 1809).
101 See Bunting's Estate, 16 W.N.C. 347 (1884).
102 See Miner's Bank v. Heilner, 47 Pa. 452 (1864).
103 As for provisions of the Act, see discussion under Mortgages, supra.
104 Bantleon v. Smith, 2 Binn. 146 (Pa. 1809). (Ground rent was irredeemable. Query: Would conclusion have been the same if it had been redeemable and overdue?)

Leases

Though a leasehold interest is personalty, usually described as a chattel real, it is nonetheless an estate carved out of the fee, and treated as such for the purposes of divestiture. Thus the lease is not divested in an execution sale on a subsequent encumbrance on the landlord's reversionary interest. In such case, the tenant's right of possession is superior to that of the purchaser at sheriff's sale.[105] However, the purchaser has the statutory right to have the tenant execute a new lease or attorn to him in writing.[106] If the tenant refuses, the purchaser can oust him from possession notwithstanding the fact that the lease preceded the encumbrance on which the sale was had.[107] Where the execution sale is on an encumbrance preceding the lease, the purchaser's right of possession is necessarily superior to that of the tenant. Though the purchaser may treat the leasehold as extinguished and oust the tenant, he has the statutory right to affirm the lease, and consider himself the landlord thereunder.[108] His acceptance of rent under the lease constitutes an affirmance thereof, and having made his election, is bound by it.[109] In passing, it may be noted that where there has been default in the payment of interest or principal on a mortgage antedating a lease, and the mortgagee goes into possession before foreclosure by collecting the rents from the tenant, the receipt of such rent does not constitute such an attornment or affirmance of the lease as will prevent the purchaser at sheriff's sale under a foreclosure of the mortgage, from ousting the tenant, even though the purchaser be the mortgagee himself.[110]

Since an execution sale on an encumbrance will not extinguish a prior leasehold interest, will a lien preceding the lease be divested? There is no appellate court authority on this question. There are two lower court cases which state by way of dicta that in a sale on an encumbrance subsequent to the lease, the latter is not divested, but the purchaser at sheriff's sale takes the property clear of liens anteceding the lease.[111] The soundness of this view may well be questioned, however. If execution had been issued on the senior lien, the purchaser at sheriff's sale would have had the option of either affirming or disaffirming the lease. The cases in question held that the lease was not divested in the sale on the subsequent encumbrance. In other words, the purchaser at such sale could not disaffirm the lease and oust the tenant from possession. That such right of disaffirmance may constitute a privilege of great value, there cannot be the slightest doubt, particularly where the tenant is in possession under a long term lease, and there has been an appreciable increase in rental values since the date of the inception of the tenancy.

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105 Act of April 20, 1905, P.L. 239, § 14, 12 P.S. § 2585.
106 Act of April 20, 1905, P.L. 239, § 10, 12 P.S. § 2581.
107 Act of April 20, 1905, P.L. 239, § 1, 12 P.S. § 2571.
108 Act of June 16, 1836, P.L. 755, § 119, 12 P.S. § 2611; Building Association v. Wampole, 6 Pa. Sup. 238 (1897).
109 Curry v. Bacharach, 271 Pa. 364, 117 A. 435 (1921).
110 Brown v. Aiken, 329 Pa. 566, 198 A. 441 (1938).
111 White v. Ehrens, 14 D. & C. 151 (1930); Wilford v. White, 16 D. & C. 469 (1931).

Clearly, in such case, a sale of the property subject to the leasehold will not fetch as high a price as a sale which conferred upon the purchaser the option of either affirming or disaffirming the lease. Such option may well constitute a valuable property right. Where, therefore, the leasehold interest is not extinguished, it is inequitable to discharge a prior lien on the fee and throw it upon a fund produced at a sale of a less valuable interest than was subject to the lien in question. In the judgment of the writer, therefore, consonant with Rule No. 4, supra, if a leasehold interest is not divested in an execution sale, liens preceding such leasehold likewise ought to be preserved.

[*Time Of Priority*

The basis for determining priority of liens is, at present, the *Lien Priority Law of* 1951.[111a] It should be remembered that this Act fixes only the time for determining priority and not the order of priorities itself. The Act provides as follows:

> Liens against real property shall have priority over each other on the following basis:
>
> (1) Purchase money mortgages, from the time they are delivered to the mortgagee, if they are recorded within thirty days after their date; otherwise, from the time they are left for record.
>
> (2) Other mortgages and defeasible deeds in the nature of mortgages, from the time they are left for record.
>
> (3) Verdicts for a specific sum of money, from the time they are recorded by the court.
>
> (4) Adverse judgments, orders and decrees, from the time they are rendered.
>
> (5) Amicable judgments, from the time the instruments on which they are entered are left for entry.
>
> (6) Writs which when issued and indexed by the prothonotary create liens against real property, from the time they are issued.
>
> (7) Other instruments which when entered or filed and indexed in the prothonotary's office create liens against real property, from the time they are left for entry or filing.[111b]]

Distribution

The proceeds of an execution sale are distributed in the following order:

1. Costs of the sale.[112]
2. Commonwealth's lien for taxes.[113]

111a Act of June 28, 1951, P.L. 927, §§ 1-3, 68 P.S. §§ 601-603.
111b Act of June 28, 1951, P.L. 927, § 2, 68 P.S. § 602. See 68 P.S. § 603 for endorsement of time.
112 Shelly's Appeal, 38 Pa. 210 (1861).
113 Act of June 3, 1933, P.L. 1474, § 1, 72 P.S. § 1401.
114 Deleted.

3. Municipality's lien for taxes. . . .Municipal claims.[114a]

4. Private liens discharged, in the order of their priority. . . .[116]

5. Surplus, if any, to the owner.[117]

As has been indicated several times hereinbefore, the record order of encumbrances controls divestiture, but for purposes of distribution, the true order of priority among the various lien creditors will determine their right *inter se.*[118] For example, A the owner of Blackacre executes a mortgage thereon to B. Later A executes a mortgage to C, who has knowledge of B's prior mortgage. C records before B records. If C forecloses, both mortgages will be divested, but B will be paid out of the proceeds of the sheriff's sale before C, for since C knew of the existence of B's mortgage, as to him, it is as though it had been recorded.[119]

A particularly intriguing problem in priorities, which has been described as a first rate legal puzzle,[120] is involved in the following type situation. A's lien is prior to B's, B's lien is prior to C's, and C's lien is prior to A's. How shall distribution be made? A typical illustration is found in *Miller's Appeal,*[121] in which the liens against a decedent's land were in the following order: (1) two mechanics' liens; (2) two mortgages; (3) one mechanic's lien; (4) claim for widow's exemption. The land was sold for the purposes of paying these claims, and the problem of distribution among the various lien claimants then arose. Though the widow's exemption is paid before ordinary lien creditors, it is subordinate to the rights of the mortgagee.[122] Hence, in the foregoing case, the first two mechanics' liens were prior to the mortgage, but subordinate to the widow's claim, which in turn, was inferior to the mortgage. Here is the circuitous equity situation which thus far has defied logical solution. Since the knot could not be untied, the Supreme Court of Pennsylvania cut through it and applied the rule which has been followed since *Wilcocks v. Waln,*[123] It is a rule of expediency, and has been stated as follows:

> "If a third encumbrance be superior to the first, but inferior to the second, yet as you could not prefer the third over the first without

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114a The Act of July 7, 1947, P.L. 1368, § 301, 72 P.S. § 5860.301 as amended June 30, 1951, P.L. 991, § 1. The Act as amended makes municipal taxes on property a first lien on the same, having priority of payment over all liens ". . . save and except only (1) the costs of the sale and the proceedings upon which it is made, and tax liens in favor of the Commonwealth of Pennsylvania, which shall have priority to such tax liens and (2) municipal claims which shall have equal priority with such tax liens."

115 Deleted.

116 Douglass' Appeal, 48 Pa. 223 (1864).

117 Act of June 16, 1836, P.L. 755, § 93, 12 P.S. § 2672.

118 Stewart v. Freeman, 22 Pa. 120 (1853): record is controlling as of date of sale rather than date of sheriff's deed; Warren Pearl Works v. Rappaport, 303 Pa. 235, 154 A. 587 (1931): mortgage preceded by judgment not satisfied of record, though paid is divested. Reap v. Battle, 4 Kulp 453 (1887). Judgment marked satisfied even though not paid in full is treated as paid for purposes of divestiture.

119 Butts v. Cruttenden, 14 Pa. Sup. 449 (1900); Britton's Appeal, 45 Pa. 172 (1863).

120 29 Ill. L. Rev. 952 (1935).

121 122 Pa. 95, 15 A. 672 (1888).

122 Titus's Estate, 18 D. & C. 344 (1932).

123 10 S. & R. 380 (Pa. 1824).

giving it preference over the second, the appropriation is made just as if the first was first, second next, and third last."[124]

Is the foregoing principle to be applied in a case such as the following? A, the owner of Blackacre, executes a mortgage thereon to B. B fails to record. A then executes another mortgage to C, who has notice of B's mortgage. C records. Later, D, without notice of B's mortgage, enters judgment against A. C issues execution. How shall the proceeds of the sale be distributed? In substantially this situation, the Supreme Court of Pennsylvania, in *Manufacturers' and Mechanics' Bank v. Bank of Pennsylvania,*[125] applied the principle of *Wilcocks v. Waln,* supra. Unfortunately, the facts of the case as reported do not specify the amount of the fund upon which the various liens were thrown. The opinion of the court, however, would seem to indicate that the fund was insufficient to pay any part of D's judgment in any event; so that the issue was actually limited to the rights of B and C *inter se.* There can be no doubt that in such case, the principle of *Wilcocks v. Waln* solves the problem equitably. This is best demonstrated by an illustration with figures. A has an unrecorded mortgage for $5000. B, with notice, takes and records a 2nd mortgage for $8000. C, without notice, enters judgment for $4000. B forecloses, and the property is sold at sheriff's sale for $7000. It is obvious that C cannot come in on the fund in any event. Even if distribution were made in accordance with the priorities as they appear on the record, C would receive nothing, for B's prior mortgage would consume the entire fund. The issue is therefore between A and B, and since B took with notice of A's prior mortgage, A of course is ahead of B. This was apparently the situation in *Manufacturers' & Mechanics' Bank v. Bank of Pennsylvania,* supra. Suppose, however, that the fund produced at sheriff's sale had been $10,000. In such case, the rule in *Wilcocks v. Waln* cannot be applied without prejudicing C. If C were accorded the protection which reliance upon the record should afford him, he would receive $2000. If the principle of the *Wilcocks* case were applied, he would receive nothing. The situation here involved differs materially from that presented by *Wilcocks v. Waln,* supra; *Miller's Appeal,* supra; or *Manufacturers' & Mechanics' Bank,* supra. In the first two cases, the circuitous priorities were caused exclusively by operation of law. None of the parties caused or could have prevented the situation from arising. In the last of the named cases, though the revolving priorities were caused by the failure of the holder of the first mortgage of record, the judgment creditor without notice wasn't prejudiced since he would have received nothing in any event. Hence, because of the factual dissimilarities between the cited cases and the hypothetical, the decisions in question are not controlling.

Where A has failed to record, B has recorded with notice, and C has recorded without notice, C alone is in a completely helpless position. A could have pre-

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124 Miller's Appeal, 122 Pa. 95, 99, 15 A. 672 (1888). See also Tomb's Appeal, 9 Pa. 61 (1848); Loucheim Brothers Appeal, 67 Pa. 49 (1871).

125 7 W. & S. 335 (Pa. 1844).

vented the circuity by recording. B could have prevented it by refusing to accept a mortgage unless and until the prior mortgage had been recorded. C, however, cannot protect himself at all if he may not rely on the record. He can do nothing to prevent the circuity. If the only parties involved were A and C, the latter, of course, would be ahead. Shall the intermediation of B be permitted to yield A a windfall merely because B happened to have notice of A's unrecorded mortgage? Since C alone could have done nothing to have prevented the situation from arising, it would seem that he ought to be accorded the protection that reliance on the record was intended to afford. C therefore ought first to be paid that sum which he would have received had the priorities been as they appeared on the record. To hold otherwise would impair the results intended to be achieved by recording acts, and would act as an effective restraint on many security transactions, for no one could safely lend money on the security of real estate if it were already subject to an encumbrance. After paying C, the next problem is the determination of the rights of A and B in the residue. If B has not been prejudiced by the circuity, the solution is obvious. The residue will go to A. For example, if A's unrecorded mortgage is $5000, and the sheriff's sale produces only $3000, A will receive the residue, since B would have received nothing in any event. Suppose however that the fund available for distribution is $7000, A's unrecorded mortgage is $5000, B's mortgage is $3000, and C's is $3000. The residue after paying C is $4000. If this sum is paid to A, B has been prejudiced to the extent of $2000, for this is the amount he would have received if the only parties involved had been A and B. How shall their rights *inter se* be determined? Either one of them could have prevented the circularity, — A by recording; B by refusing to lend his money on the security of a mortgage unless A recorded. To favor A in this situation would effectively discourage the extension of credit on the security of real estate subject to an unrecorded mortgage. To favor B would have no detrimental consequences other than to prejudice A. Nor can this result be said to be inequitable, for A can anticipate a circuity as a result of his failure to record, and hence should be held to have assumed the risks incident thereto. This conclusion was reached by the Supreme Court of Ohio in *Day v. Munson.*[126] The syllabus states the rule as follows:

> "To the *third* mortgagee, so much of the fund as would be applicable to his mortgage after satisfying the prior lien of the second. To the *second,* so much of the whole fund as would be applicable to his debt, after satisfying the prior lien of the first, and without reference to the third. And to the *first* mortgagee, the residue."[127]

The Pennsylvania law on the question under consideration is somewhat uncertain. The cases state the general proposition, without qualification, that where the priorities are rotary, distribution is to be made in temporal order. Up to the present time, no Pennsylvania case has noted the distinction between a circuity created exclusively by operation of law and one created as a result of the failure of one

126 14 Ohio St. 488 (1863).
127 See also dissent by Dixon, J., in Hoag v. Sayre, 33 N.J. Eq. 552 (1881).

of the parties to record. However, as has already been pointed out herein, due to material factual differences, the cases already discussed cannot be said to be controlling. Two additional cases merit attention. The first is *Phillips' Estate* (No. 4),[128] the facts of which are as follows: A bequeathed a sum of money to B. B assigned to C and then to D. Later, X, a judgment creditor of B, attached the latter's interest in the hands of A's executor. B then made another assignment to E. E gave notice of his assignment before C or D. This resulted in a circuity.[129] The Supreme Court applied the principle of the *Wilcocks* case, and distributed the fund according to temporal priority. However, *Phillips' Estate* is not necessarily conclusive on the question under consideration, for it related to assignments of a chose in action. Hence it could be argued that the element of reliance upon the record was not involved, though of course, there is some analogy between recording and giving notice to the debtor of an assignment of a chose. The second case is *Dowling v. Vallett,*[130] the facts of which follow: Wagner entered judgment against Caroline A. Parks, the latter having notice of the fact. At the time of the entry of judgment, she owned real estate under the name of Caroline Parks. Subsequently she conveyed the property to Jennie B. Vallett, executing the deed in the name of Caroline Parks, but taking back a purchase money mortgage in the name of Caroline A. Parks, and on Vallett's default, entered judgment on the bond. Later, Fitt and Dowling entered judgment against Jennie B. Vallett in the order named. The question arose as to how the land should be distributed. If the judgment entered against Caroline A. Parks does not constitute notice when the property is held in the name of Caroline Parks, a circuity results, for Wagner would be prior to Parks, Parks would be ahead of Fitt and Dowling, and Fitt and Dowling would be prior to Wagner. The Superior Court refused to decide whether a judgment entered against Caroline A. Parks constitutes notice of a judgment against Caroline Parks, holding that it was immaterial to the decision of the case, for even if it did not constitute notice, distribution would be made in the temporal order of priority anyway, because of the circuity. Though the evaluation of this case as authority on the problem under consideration must be accorded the most serious consideration, it cannot be regarded as decisive. It could be argued that the circuity in *Dowling v. Vallett* was created exclusively by operation of law; that none of the parties was at fault, as is the case where there has been a failure to record. Hence it may be said to be within the line of cases represented by *Wilcocks v. Waln* and *Miller's Appeal,* supra, and the *ratio decidendi* therein would not embrace a situation where the circuity was due to the failure of one of the parties to record. It must therefore be concluded that thus far no Pennsylvania case has decided how distribution shall be made where there is an unrecorded

128 205 Pa. 525, 55 A. 216 (1903).
129 E was prior to C and D by virtue of his prior notice. (Phillips' Estate, No. 3, 205 Pa. 515, 55 A. 213 (1903).) X, by reason of his attachment, was prior to E. C and D, however, were prior to X, for X stands in the shoes of his debtor B, and as against B, C and D did not have to give notice. Hence the priorities were circuitous.
130 70 Pa. Sup. 481 (1918).

mortgage, then a mortgage recorded with notice, and finally a mortgage recorded without notice, where distribution in accordance with the formula of the *Wilcocks* case would prejudice the holders of the second and/or third mortgages.

Another interesting problem in distribution arises when the encumbrance divested does not represent a charge for a specific sum of money, as where the encumbrance either is not a pecuniary one, or if it is, the amount thereof is indefinite at the date of the sheriff's sale. For example, how shall distribution be made as between life tenant and remainderman where both the life estate and the remainder are divested? The leading Pennsylvania case on the subject is *Datesman's Appeal.*[131] The syllabus states the rule as follows:

> "Two methods of distribution are lawful: One, to treat the surplus as real estate and direct its investment, until with its accumulations it reaches the value of the land sold, and then award the interest on the amount to the life-tenant during life, and at his death the corpus to the remaindermen; the other, to value the life interest, give the tenant thereof his share in cash, and divide the balance in cash to the remaindermen."

Which of the two specified methods shall be employed is a matter resting largely in the discretion of the court. The plan to be adopted depends upon the equities of the particular case.[132] In *Foote's Estate,*[133] the auditing judge said in his adjudication:

> "No citation of authorities is necessary for the statement that where real estate in which a life tenant has an interest is sold, the usual practice is to award the life tenant the interest earned by the fund for life and the principal to the remaindermen upon the death of the life tenant. . . ."

If the foregoing represents the *usual practice,* the writer has been unable to find a single Pennsylvania case wherein the court adopted the *usual practice.* In all of them, the fund was divided between the life tenant and the remaindermen.[134] In such case, the formula by which the respective values of the life estate and the remainder shall be determined is in itself a substantial legal problem. The English common law adopted the rule that the value of the life interest equalled one-third of the fund, and the remainder, two-thirds. This arbitrary rule of thumb which has little more than convenience to commend it, was applied in all but one of the Pennsylvania cases.[135] The single exception is *Foote's Estate,* supra, wherein the court ascertained the value of the life estate by reference to the Carlisle Tables. As authority in justification of the employment of this method of eval-

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131 127 Pa. 348, 17 A. 1086 (1889).
132 Foote's Estate, 24 Pa. Dist. 507 (1913).
133 Ibid.
134 Datesman's Appeal, 127 Pa. 348, 17 A. 1086 (1889); Shippen's Appeal, 80 Pa. 391 (1876); Dennison's Appeal, 1 Pa. 210 (1845); Foote's Estate, 24 Pa. Dist. 507 (1913); Henderson v. Henderson, 4 Pa. Dist. 688 (1896); Scranton v. Scanlon, 7 Lack. Leg. News 157 (1901).
135 Datesman's Appeal, 127 Pa. 348, 17 A. 1086 (1889); Shippen's Appeal, 80 Pa. 391 (1876); Dennison's Appeal, 1 Pa. 201 (1845); Henderson v. Henderson, 4 Pa. Dist. 507 (1895); Scranton v. Scanlon, 7 Lack. Leg. News 157 (1901).

uation, the court cited *Steinbrunner v. Pittsburgh Ry.*,[136] involving a suit in trespass for negligence resulting in death, in which the Supreme Court held that the Carlisle Tables were some evidence on the issue of life expectancy, to be considered by the jury along with other matters "such as the state of health of the person, his habits of life, his social surroundings," etc. In the course of the opinion, however, the court said:

> "In Shippen's Appeal, 80 Pa. 391, it was held that the Carlisle table was not authoritative in determining the value of a life-estate, and the common-law of one third the capital sum was adopted as the measure of the life interest. . . .
>
> "We can understand that in a contest between a life-tenant and the remainderman, the Carlisle tables would not serve as an authoritative guide. In such instance the question must be decided upon its own facts."[137]

Why the Carlisle Tables constitute competent evidence in the one case and not in the other would appear to be somewhat difficult to perceive. Evidently the court in *Foote's Estate,* supra, shared the writer's lack of perception and preferred the Carlisle Tables to the arbitrary common law rule of one-third to the life tenant and two-thirds to the remaindermen.

The present status of the law on the subject is further complicated by *McCommon v. Johnson,*[138] wherein plaintiff brought suit against defendant attorney for damages caused by the latter's fraud in inducing her to execute a quit-claim deed to a life interest in certain real estate. She offered the Carlisle Tables as some evidence of life expectancy. The defendant not only made no objection, but he also based his evaluation of the life estate on the Tables. The Superior Court dismissed the defendant's appeal on the ground, *inter alia,* that having accepted the theory of evaluation in the lower court, and in fact acted upon it himself, "it is too late to advance another which might have been, but was not, put forward at the trial." The court thoroughly discusses the Pennsylvania cases involving the valuation of a life estate, and says:

> "From these cases, we cannot find that in estimating the value of a life-estate ,a fixed rule has been adopted by our courts. Each case must be determined upon its own facts with the end in view of arriving at an equitable and just valuation."[139]

It is not unlikely that this last case will furnish leverage for overturning the one-third-two-thirds formula, and the substitution therefor of a rule which, though flexible and incapable of producing results with mathematical exactitude or scientific precision, is nonetheless a much more sensible guide to the valuation of life estates than the ancient, arbitrary common law rule, the reasons for which ceased to exist when life expectancy tables came into existence.

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136 146 Pa. 504, 23 A. 239 (1892).
137 Ibid at 516, 23 A. 239, 241 (1892).
138 123 Pa. Sup. 581, 187 A. 445 (1936).
139 Ibid at 590, 187 A. 445, 449 (1936).